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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL CALHOUN, Defendant and Appellant.	A091255 (Contra Costa County Super. Ct. No. 991523)

Darrell Calhoun appeals from a judgment, following a jury trial, finding that he is a sexually violent predator (SVP) as defined by Welfare and Institutions Code[1] section 6600, and committing him to the Department of Mental Health for two years.

FACTS

The prosecution offered the testimony of two experts, Dr. Elaine Finnberg and Dr. Charles Jackson. Both experts prepared reports concluding that appellant had been convicted of sexually violent offenses against two or more victims, that he has a diagnosable mental disorder, and that as a result of the disorder he was likely to commit sexually violent predatory offenses, if not subjected to appropriate custody and treatment. Their testimony at trial explained the basis of these conclusions. Each expert relied in part upon police reports and other documentary evidence concerning the details of appellant's criminal offenses. Over appellant's hearsay objection the court permitted the experts to testify to details of the offenses underlying the qualifying convictions, and

[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

admitted police reports, preliminary hearing transcripts, medical reports, and other documents pertaining to these offenses.

Appellant testified on his own behalf, asserting that with respect to Ada R. he had consensual sex in exchange for drugs. With respect to Catherine K., he denied that he had any sexual contact with her at all.

I

Admission of Documentary Evidence to Prove Details of Predicate Offenses

While this appeal was pending, our supreme court decided *People v. Otto* (2001) 26 Cal.4th 200. The court rejected appellant's contention that section 6600, subdivision (a)(3), which permits the details of predicate offenses to be proven by documentary evidence, "including *but not limited* to, preliminary hearing transcripts, [trial transcripts], probation and sentencing reports, and evaluations by the [State Department of Mental Health]," does not allow any hearsay statements contained in these documents to be admitted unless they fall within an exception to the hearsay rule. The court held that section 6600, subdivision (a)(3), "allows the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted." (*Id.* at p. 208.)

We find nothing in *People v. Otto*, *supra*, 26 Cal.4th 200 to support appellant's argument that the court's decision only authorizes the use of hearsay contained in probation and sentencing reports, and would not extend to the admission of police reports and preliminary hearing transcripts. Although the documentary evidence at issue in *Otto, supra,* was a presentence report, the court did not limit the scope of the hearsay exception created by section 6600, subdivision (a)(3) to probation and sentencing reports. The use of the phrase "including, but not limited to," in section 6600, subdivision (a)(3), clearly expresses the legislative intent that the scope of the hearsay exception created is not limited to the types of documentary evidence enumerated. Although police reports are not expressly enumerated, probation reports are, and California Rules of Court, rule 4.411.5 contemplates that police reports will be used to summarize the details of the offense. Section 6600, subdivision (a)(3) also expressly enumerates the admission of

preliminary hearing transcripts. Therefore the hearsay exception defined in *Otto, supra,* clearly includes statements contained in the preliminary hearing transcript.

The court also rejected appellant's related contention, that even if section 6600, subdivision (a)(3) authorizes the admission of multiple hearsay, reliance upon such evidence violates his due process right of confrontation. (*People v. Otto, supra,* 26 Cal.4th 200, 214.) However, the court held that due process does require that the particular victim's hearsay statements contained in the documentary evidence "contain special indicia of reliability" before they may be admitted to prove the details of a prior conviction in an SVP proceeding. (*Id.* at pp. 210; 216 [George, C.J. concurring].) Relevant factors in evaluating the reliability of these statements include, "the context in which the statements appear . . . the circumstances surrounding the making of the statement, if known, such as spontaneity and consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age [if the declarant is a child], lack of motive to fabricate, and whether the hearsay statement was corroborated." (*Id.* at p. 211.) The court also stated that "[t]he most critical fact demonstrating the reliability of the victim hearsay statements is that [the SVP] was convicted of the crimes to which the statements relate." (*Id.* at p. 211.) Chief Justice George, joined by Justice Kennard, wrote a concurring opinion, disagreeing that conviction after trial or upon a plea of guilty is the most critical factor, and emphasizing that "[t]he circumstances of each case must be evaluated to assess whether hearsay contained in documentary evidence is sufficiently reliable to be admitted in a [SVP] proceeding.[2] (*Id*. p. 215.)

With respect to the rape of Ada R. in 1989, the prosecution experts were permitted to testify regarding details of the crime contained in two police reports, a medical report, and a transcript of Ada R.'s testimony at the preliminary hearing. These documents, the original and amended information, and the abstract of judgment were admitted into

[2] Accordingly, this court ordered the parties to submit supplemental briefing providing a particularized analysis of the reliability of the hearsay statements contained in the admitted documentary evidence in this case.

evidence.[3] Only the police, and medical reports, and the preliminary hearing transcript contained Ada R.'s hearsay statements. Applying the foregoing factors enumerated in *People v. Otto*, *supra*, 26 Cal.4th 200, we have no difficulty concluding that these statements contained sufficient indicia of reliability to satisfy due process: Ada R. made her statements to the police while in the hospital immediately after the assault occurred. Although she appeared distraught, and had difficulty relating the events, she provided the police with a description of the brutal attack in great detail. She also described seeing a Bible in the car or the trunk with the name "Daniel" or "Darryl" Calhoun on it. The police report also stated that appellant admitted that he had such a Bible, and it must have fallen out of his pocket during consensual sex with Ada R. Ada R. was later able to identify appellant with certainty in a photo line-up. She had an incentive to be accurate in her statements to the police to aid the police in identifying and capturing her assailant, and in her statement to the doctors, so that they could provide the medical care she needed. The medical examination listed the same series of sexual and physical assaults that Ada R. described to the police, and the physical examination disclosed injuries consistent with the type of attacks Ada R. described, thereby corroborating her statements. At the preliminary hearing she testified under oath, and was subjected to extensive cross-examination, yet her description of the attack was, in most respects, consistent with her statements to the police and in the medical report. Ada R. did not know appellant, and had no apparent motive to fabricate her account. Finally, despite appellant's testimony at the SVP hearing that he had consensual sex with Ada R. in exchange for drugs, he could not explain her physical injuries, and, instead of challenging the accuracy of her account in the underlying proceedings leading to his conviction, pleaded guilty to one count of forcible rape of Ada R.

[3] Appellant does not identify any specific hearsay statements concerning the details of the offense contained in the information, or abstract of judgment admitted with respect to either Ada R. or Catherine K. Instead, he suggests that all of the documentary evidence should be deemed inherently unreliable because, it was neither certified nor authenticated. These are independent objections, which must be made at the time of trial, or are waived on appeal. In the absence of any citation by appellant to a timely objection at trial on these grounds, we shall assume none was made.

With respect to Catherine K., the prosecutor introduced three police reports, a medical report, the probation officer's report, the information, the abstract of judgment, and a minute order regarding sentencing. Again, we are satisfied that the hearsay statements contained in the documents have sufficient indicia of reliability: Catherine K. made her statements to the police within six hours of the attack, after her boyfriend persuaded her that she should, despite her fear of being arrested on an outstanding traffic warrant. Soon thereafter she underwent a medical exam. In her subsequent statements to the police, and the medical examiner, she repeated most of the details, and was consistent in her description of the sexual attack. The probation officer's report simply relied upon the police report to summarize Catherine K.'s description of the attack. Catherine K. acknowledged having met appellant before, but had no apparent motive to fabricate. Finally, although in the SVP hearing appellant testified that assault on Catherine K. never occurred, he pled guilty to forcible rape and assault with intent to commit a sexual offense.

II

CALJIC NO. 17.41.1

Appellant next contends that instructing the jury with CALJIC No. 17.41.1 constitutes state and federal constitutional error because the instruction infringes on the power of jury nullification, invades the secrecy of jury deliberation, chills free and open debate, and deprives him of the right to a unanimous jury.

In *People v. Williams* (2001) 25 Cal.4th 441, the court held that removal of a juror who announces his intention to nullify the law does not violate the defendant's constitutional right to a jury. The validity of CALJIC No. 17.41.1 is still under review by the California Supreme Court in several pending cases. (See, e.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000 (S086462); *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000 (S088909); *People v. Morgan* (2001) formerly 85 Cal.App.4th 34, review granted March 14, 2001 (SO94101).) We, however, need not decide the question whether giving CALJIC No. 17.41.1 violated

appellant's constitutional rights because, even if our supreme court were to decide it is error to give this instruction, the error would not be reversible per se, and, even under the more favorable *Chapman* standard of review, (*Chapman v. California* (1967) 386 U.S. 18) the error was harmless beyond a reasonable doubt.

In *People v. Molina* (2000) 82 Cal.App.4th 1329, review denied November 29, 2000, the defendant challenged the constitutional validity of CALJIC No. 17.41.1 on essentially the same grounds as those asserted by appellant. The court explained that, assuming arguendo, the giving of CALJIC No. 17.41.1 is error, "it is not 'structural error' and does not require reversal per se. All the instruction does is to require jurors to inform the court of juror misconduct. It does not ' "affect[] the framework within which the trial proceeds," ' nor does it 'necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' (*Neder v. United States, supra,* 527 U.S. at pp. 8-9 [119 S.Ct. at pp. 1833-1834, 144 L.Ed.2d at pp. 46-47], italics omitted; see also *People v. Flood, supra*, 18 Cal.4th at p. 493.) We do not agree that the instruction is likely to be coercive. Absent misconduct by the jury, expressly identified in the instruction, the instruction is not likely to enter into jury deliberations at all. In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute structural error requiring the reversal of every case in which it is given. We think that such a result would be, frankly, absurd. [¶] Accordingly, we conclude any error in instructing the jury with CALJIC No. 17.41.1 is not reversible per se, but rather is subject to harmless error analysis." (*Id*. at p. 1335.) Applying the *Chapman* standard, the court observed that the jury had deliberated for less than an hour, and there was no indication of deadlock or hold out jurors, or of any communications with the court. It therefore concluded the assertion that the instruction had a chilling effect on the jury's deliberations, or on the power of jury nullification was purely speculative. (*People v. Molina, supra,* 82 Cal.App.4th at p. 1335-1336.)

Similarly, here, the record indicates that the jury deliberations began at 2:45 p.m. on the sixth day of trial. At 3:30 the jury requested the exhibits and at 4:55 p.m. they adjourned for the day. They rendered their verdict at 10:45 a.m. the next day. We find

nothing in the record to suggest that the jury had any trouble reaching a unanimous verdict, or that there was even a potential holdout juror. In the face of this record, we find appellant's claim of prejudice to be purely speculative, and conclude that any error in giving CALJIC No. 17.41.1 was harmless beyond a reasonable doubt.

CONCLUSION

The judgment is affirmed.

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Stein, Acting P.J.

We concur:

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Swager, J.

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Marchiano, J.